

1 THE HONORABLE ROBERT J. BRYAN
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UNITED STATES DISTRICT COURT
WESTERN DIVISION OF WASHINGTON AT TACOMA

9 DONALD VARNEY AND MARIA VARNEY,
10 husband and wife,

11 Plaintiffs,

12 v.

13 AIR & LIQUID SYSTEMS CORPORATION, et
al.

14 Defendants.

No. 3:18-cv-05105-RJB

DEFENDANT THE GOODYEAR
TIRE AND RUBBER COMPANY'S
MOTION FOR SUMMARY
JUDGMENT

NOTED ON MOTION CALENDAR:
APRIL 5, 2019

WITHOUT ORAL ARGUMENT

15 I. RELIEF REQUESTED AND INTRODUCTION

16 The Goodyear Tire and Rubber Company ("Goodyear Tire") moves for summary
17 judgment dismissing all claims and cross claims against it. There are two grounds for this
18 motion:

- 19 1. there is no admissible evidence Mr. Varney inhaled asbestos from a Goodyear Tire
20 gasket, and
21 2. there is insufficient evidence asbestos from a Goodyear Tire gasket was a proximate
22 cause of Mr. Varney's mesothelioma.
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1 Some, but not all, gaskets contained asbestos, including Goodyear Tire's. Spencer
 2 FRCP 26(a)(2) report, p. 10, attached to Spencer Declaration. The only evidence Plaintiffs have
 3 that Mr. Varney was exposed to asbestos from Goodyear Tire gaskets is the Varney Declaration
 4 where Mr. Varney identifies Granite gaskets. Dkt. 231-1. Goodyear Tire objects to the
 5 Declaration as inadmissible hearsay and the Court has set a hearing in connection with other
 6 motions to rule on that objection. Dkt. 255 and Court's email of 3/5/19.

7 Goodyear Tire's second point is that if the Varney Declaration is admitted into evidence,
 8 it provides insufficient details about the claimed exposure to asbestos from Goodyear Tire
 9 gaskets to support a jury finding of proximate cause. Goodyear Tire sold gaskets that contained
 10 asbestos and that did not; but all were non friable and working with asbestos gaskets generated
 11 trivial quantities of dust. Spencer report, pp. 10 and 15. The only evidence Plaintiff has
 12 addressing the causes of Mr. Varney's disease is the report of Dr. Maddox, Dkt. 231-28. Dr.
 13 Maddox's report concedes that trivial exposures are not a cause. *Id.* at p. 64. Although Dr.
 14 Maddox disputes that gasket work in general is trivial, he did not opine about Varney's exposure
 15 to Goodyear Tire's gasket, Granite. He did not say Mr. Varney's exposure to Granite gaskets
 16 was more than trivial. Because Plaintiffs' evidence concedes trivial exposures are not causative
 17 and Goodyear Tire has evidence that Varney's exposure to Goodyear Tire's gaskets would have
 18 been trivial, which is not controverted, Goodyear Tire asks the Court to dismiss all claims against
 19 it.

20 II. STATEMENT OF FACTS

21 The Court's Order on Defendants' Joint Notice and Request for Leave to File Briefing
 22 Regarding Inadmissible Hearsay Submitted by Plaintiff in Opposition to Flowserve's Motion for
 23 Summary Judgment, Dkt. 255, describes the facts pertinent to this Motion. The day before he
 passed away, Mr. Varney signed a Declaration stating he worked as a marine machinist in

1 Bremerton, Washington, from 1957–1962 and 1968–1972, and in San Francisco, California,
 2 from 1965–1968. Dkt. 231-1. As a marine machinist in both locations, and without receiving any
 3 warning of asbestos or cancer, Mr. Varney removed and replaced asbestos-containing gaskets,
 4 packing, and insulation used with valves and pumps, causing him to breathe dust. Dkt. 231-1.
 5 Mr. Varney “breathed dust from the removal and replacement of asbestos-containing gaskets,
 6 packing, and insulation associated with … machinery” manufactured by General Electric,
 7 Westinghouse, Crane, Edward, Atwood, Crosby, Warren, Chicago, Buffalo, Goulds, Peerless,
 8 Pacific, Bell & Gossett, Allis Chalmers, Byron Jackson, Deming, Denison, Carrier, Ingersoll-
 9 Rand, Sturtevant, Armstrong, Babcock, and Foster Wheeler, with gaskets and packing from
 10 Granite, John Crane, and the original manufacturers of the equipment. Dkt. 255.

11 Mr. Varney passed away before he could give a deposition. Dkt. 255. As with the other
 12 Defendants who moved for summary judgment, the only evidence Mr. Varney was exposed to
 13 respirable asbestos from products manufactured or supplied by Goodyear Tire is the Varney
 14 Declaration identifying Granite gaskets.

15 The only evidence disclosed by Plaintiffs regarding the effects of asbestos on Mr.
 16 Varney is the expert report of Dr. John Maddox. Dkt. 231-28. Dr. Maddox opines that
 17 mesothelioma is the cumulative result of the exposures to asbestos that a person receives but that
 18 does not include trivial exposures. Dkt. 231-28 at p. 64. The report does not say Mr. Varney’s
 19 exposure to Goodyear Tire Granite gaskets was more than trivial and provides no specifics about
 20 that alleged exposure. With respect to gaskets in general, Dr. Maddox writes:

21 “Occupational exposures, in my opinion, to asbestos-containing brakes, gaskets, packing
 22 and thermal insulation, are very high exposures to asbestos.” Id. at p. 25.

23 “In Varney’s case, his repetitive, high, and prolonged exposures to gaskets and packing
 were sufficient to cause mesothelioma.” Id. at p. 28.

1 “... the consensus of the scientific community is that any occupational or para-occupational
 2 exposure to asbestos, even brief or low-level exposures, must be considered causal in an
 3 individual with a mesothelioma.” *Id.* at p. 42.

4 He cites to a paper by Iwatsubo from 1998 addressing the minimum dose required to develop
 5 mesotheliaoma:

6 “Illgren and Browne considered whether a threshold exposure might exist and concluded
 7 that mesothelioma was unlikely in persons exposed for less than 5 f/ml-years. Our results
 8 indicate, however, that mesothelioma cases occurred below a cumulative exposure of 5 f/ml-
 9 years and perhaps below 0.5 f/ml-years.” *Id.* at p. 42.

10 Dr. Maddox does not corelate Mr. Varney’s work with Goodyear gaskets to the Iwatsubo’s data

11 that mesothelioma’s occur at exposures as small as 0.5 f/ml-years.¹ Dr. Maddox does not define
 12 trivial exposure, which is not causative, or brief low-level exposure, which is causative. He
 13 does not explain the difference between those two exposures, but it would reasonable to
 14 construe his opinion as defining brief low-level exposure as no less than 0.50 fiber ml-years.

15 Dr. Maddox does not provide facts showing Mr. Varney’s Cranite gasket exposure was 0.50
 16 fiber ml-years or more. Dr. Maddox’s report contains no information, either qualitative or semi-
 17 quantitative, about the duration, frequency, and concentration of asbestos in the air when Mr.
 18 Varney was exposed to Cranite, if he was exposed at all.

19 Goodyear’s expert, Dr. John Spencer, provides data on levels of dust generated during
 20 gasket work. Spencer report pp. 11-12. Gaskets generate time weighted average concentrations
 21 of dust ranging from 0.0011 to 0.018 fibers per cubic centimeter (cc = ml). To accumulate a

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¹ A fiber ml-year is the unit of measure for exposure. It is the product of multiplying the concentration of the dust by the duration of the exposure. 0.5 fiber ml-years is the equivalent of 5 work years of exposure at a concentration of 0.1 fibers per ml. An exposure at 0.5 fibers per ml for one work year is also expressed as 0.5 fiber ml-years. A work year is approximately 2000 hours.

1 dose of 0.5 fiber/ml-years, a worker must perform gasket work generating the highest average
2 concentrations (0.18 fiber cc-years) for almost 30 years. 30 x 0.018 f/ml = 0.54 f/ml years.

3 **III. ISSUE**

4 Should the claims against Goodyear Tire be dismissed where there is no admissible
5 evidence Mr. Varney was exposed to asbestos from products manufactured or sold by Goodyear
6 Tire?

7 Should the claims against Goodyear Tire be dismissed even if the Varney Declaration
8 is admissible because there is insufficient evidence of the *Lockwood* factors to submit to the
9 jury the question of whether Mr. Varney's exposure to asbestos from Goodyear Tire gaskets
10 was a proximate cause of his mesothelioma?

11 **IV. EVIDENCE RELIED UPON**

12 This motion is based on the Declaration of Ben Adams and attachments thereto
13 submitted in response to Motion for Summary Judgment of Defendant Flowserve. Dkt 231, 231-
14 1, and 231-8. It also is based on the Court's Order, Dkt. 255, describing the circumstances of
15 Mr. Varney's exposure to asbestos. And it is based upon the Declaration of John W. Spencer
16 filed with this motion attaching Spencer's FRCP 26(a)(2) report.

17 **V. ARGUMENT**

18 **A. Summary Judgment Standard.**

19 Summary judgment is appropriate if the evidence shows "that there is no genuine dispute
20 as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
21 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986);
22 *Galen v. Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is "material" if it might affect the
23 outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d. 202, 106 S. Ct. 2505,
91 L. Ed. 2d 202 (1986). A factual dispute is "'genuine' only if there is sufficient evidence for a

1 reasonable fact finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d
 2 986, 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

3 The moving party bears the initial burden of showing there is no genuine dispute of material
 4 fact and that it will prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party does
 5 not bear the ultimate burden of persuasion, it can show the absence of such a dispute in two ways:
 6 (1) by producing evidence negating an essential element of the nonmoving party’s case, or (2) by
 7 showing that the nonmoving party lacks evidence of an essential element of its claim or defense.
 8 *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If
 9 the moving party meets its burden of production, the burden then shifts to the nonmoving party to
 10 identify specific facts from which a fact finder could reasonably find in the nonmoving party’s
 11 favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

12 No longer are judges required to submit a question to a jury merely
 13 because some evidence has been introduced by the party having the
 14 burden of proof, unless the evidence be of such character that it would
 15 warrant the jury in finding a verdict in favor of that party. . . . [T]here is a
 16 preliminary question for the judge, not whether there is literally no
 17 evidence, but whether there is any evidence upon which a jury could
 18 properly proceed to find a verdict for the party producing it, upon whom
 19 the onus of proof is imposed.

20 *Anderson*, 477 U.S. at 250.

21 The court is “required to view the facts and draw reasonable inferences in the light most
 22 favorable to the [nonmoving] party.” *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L.
 23 Ed. 2d 686 (2007). The court may not weigh evidence or make credibility determinations in
 24 analyzing a motion for summary judgment because those are “jury functions, not those of a judge.”
 25 *Anderson*, 477 U.S. at 249-50. But the nonmoving party “must do more than simply show that
 26 there is some metaphysical doubt as to the material facts.... Where the record taken as a whole
 27 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for

1 trial.” *Scott*, 550 U.S. at 380 (internal quotation marks omitted) (quoting *Matsushita Elec. Indus.*
 2 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

3 In short, “summary judgment should be granted where the nonmoving party fails to offer
 4 evidence from which a reasonable [fact finder] could return a [decision] in its favor.” *Triton Energy*
 5 *Corp. v. Square D Co.*, 68 F.3d 1216, 1220 (9th Cir. 1995).

6 **B. There is no admissible evidence Mr. Varney inhaled asbestos from a Goodyear
 7 Tire gasket.**

8 In any product liability suit, the plaintiff must prove that the defendant manufactured or
 9 distributed the product or products alleged to have caused the injury. In an asbestos case, for
 10 the case to move forward against a manufacturer, some witness or other evidence, at a
 11 minimum, must establish exposure to a product containing asbestos sold by the manufacturer.
 12 “Generally, under traditional product liability theory, the plaintiff must establish a reasonable
 13 connection between the injury, the product causing the injury, and the manufacturer of that
 14 product. *Lockwood v. A.C. & S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 685 (1987), *see also Van*
 15 *Hout v. Celotex Corp.*, 121 Wn.2d 697, 707, 853 P.2d 9098 (1993). Without exposure to an
 16 asbestos product sold by a manufacturer, there can be no connection between the manufacturer
 17 and the alleged asbestos related injury.

18 Here the only evidence Mr. Varney inhaled asbestos from a Goodyear Tire gasket is Mr.
 19 Varney’s Declaration of February 7, 2018. Dkt. 231-1. The Court will hear oral arguments on
 20 the admissibility of that Declaration March 26, 2019. Dkt. 255 and email of 3/5/19. If the Court
 21 rules the Declaration inadmissible, there will be no evidence Varney was exposed to asbestos
 22 from a Goodyear Tire gasket. Without that evidence, there are no genuine issues on any material
 23 fact and Goodyear Tire is entitled to judgment as a matter of law.

1 **C. The Varney Declaration and Maddox report do not say how much dust Mr.**
 2 **Varney inhaled from Goodyear Tire gaskets and Dr. Maddox concedes trivial**
 3 **exposures were not a cause.**

4 To avoid summary judgment, plaintiffs must show a causal link between the defendant's
 5 product and the injured party's disease. *Van Hout*, 853 P.2d at 913. Washington courts generally
 6 require plaintiffs to establish exposure to asbestos from a manufacturer's product was a
 7 "substantial factor" in causing plaintiff's illness. See the discussion in *Mavroudis v. Pittsburgh-*
 8 *Corning Corp.*, 86 Wash. App. 22, 28, 935 P.2d 684, 689 (1997). The Washington Supreme
 9 Court described the factors trial courts should examine in determining the sufficiency of the
 evidence on causation.

10 Trial courts should consider a number of factors when determining if
 11 there is sufficient evidence for a jury to find that causation has been
 12 established. They should consider the evidence of plaintiff's proximity
 13 to the asbestos product when the exposure occurred and the expanse of
 14 the work site where asbestos fibers were released. They should also take
 15 into account the extent of time that the plaintiff was exposed to the
 16 product. As the time of exposure to asbestos dust increases, so does the
 17 severity of diseases associated with such exposure. See 15 Ind. L. Rev.
 18 at 693.

19 Courts should also consider the types of asbestos products to which
 20 the plaintiff was exposed and the ways in which such products were
 21 handled and used. Asbestos products exist in a wide variety of forms,
 22 which differ in the amounts and percentages of asbestos they contain. In
 23 addition, the tendency of such products to release asbestos fibers into
 the air depends on their form and on the methods in which they are
 handled. See 15 Ind. L. Rev. at 691-92.

24 In addition, trial courts must consider the evidence presented as to
 25 medical causation of the plaintiff's particular disease. Such evidence
 26 would include expert testimony on the effects of inhalation of asbestos
 27 on human health in general and on the plaintiff in particular.... See 15
 28 Ind. L. Rev. at 694-95.

29 Ultimately, the sufficiency of the evidence of causation will depend
 30 on the unique circumstances of each case. Nevertheless, the factors
 31 listed above are matters which trial courts should consider when
 32 deciding if the evidence is sufficient to take such cases to the jury.

33 *Lockwood*, 109 Wash. 2d at 248-49.

1 Mr. Varney's Declaration provides little information about the Lockwood factors as
 2 applied to the Defendants. Mr. Varney says he "breathed dust from the removal and
 3 replacement of asbestos containing gaskets, packing, and insulation associated with the
 4 following machinery," lists 23 brands of equipment, and two brands of gaskets, including
 5 Granite. Mr. Varney did not state whether he personally handled the Granite or whether others
 6 were working with it. Were others working with it, he did not state how close he was to them.
 7 He did not state how often he breathed asbestos associated with Granite or the duration of his
 8 exposure. And he did not describe the expanse of the work place.

9 Plaintiffs disclosed Dr. John Maddox as the witness who will provide evidence on
 10 medical causation, the effects of asbestos on human health, and the effects on Mr. Varney. See
 11 Dkt. 231-28. Dr. Maddox stated mesothelioma is the cumulative result of the exposures to
 12 asbestos that a person receives but that does not include trivial exposures. Dkt. 231-28 p. 64.
 13 Dr. Maddox's report does not describe Mr. Varney's exposure to Granite gaskets and only
 14 generalizes that working with gaskets is "high exposure". He does not explain how one must
 15 work with gaskets to generate "high exposure". He does not state it is impossible to have a
 16 trivial exposure working with gaskets and common sense says otherwise. Dr. Maddox provides
 17 no information about the frequency, duration, and concentration of asbestos in the air from
 18 Granite to which Mr. Varney was exposed.

19 Dr. Maddox opines that exposure resulting in a cumulative dose as low as 0.05 fiber cc-
 20 years can cause mesothelioma. He does not state that Mr. Varney's work with gaskets in
 21 general, or with Granite in particular, caused an exposure as high as 0.5 fiber cc-years. Although
 22 Dr. Maddox opines that gasket work produces very high exposure to asbestos, he cites no data
 23 in support of that opinion.

1 Dr. Maddox did not characterize Mr. Varney's exposure to asbestos from Goodyear
 2 gaskets either qualitatively or quantitatively. There is no evidence Varney sustained "high
 3 exposure" from Goodyear gaskets other than Dr. Maddox's general statement that Mr. Varney's
 4 "repetitive, prolonged, and high exposures to gaskets and packing were sufficient to cause
 5 mesothelioma." He provided no information about what fraction of that exposure is attributable
 6 to Cranite.

7 **VI. CONCLUSION**

8 The only evidence that Mr. Varney was exposed to asbestos for which Goodyear Tire
 9 could be held liable is the Varney Declaration. If that Declaration is inadmissible, Plaintiffs
 10 have no evidence of exposure to asbestos from Goodyear Tire gaskets. But even if the
 11 Declaration is admissible, there is no evidence about the extent of that exposure. It is impossible
 12 for a jury to determine the exposure was not trivial, and therefore a cause. Goodyear Tire
 13 respectfully requests the Court grant its motion and dismiss with prejudice Plaintiffs' claims
 14 and Defendants' cross claims against Goodyear Tire.

15 DATED this 12th day of March 2019.

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